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IN THE

Supreme Court of the United States

October Term, 1966

No. 295

MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNION NO. 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

against

OLD DUTCH FARMS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Milk Drivers and Dairy Employees Local Union No. 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on March 31, 1966.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, dated March 31, 1966, is reported at 359 F. 2d 598, and also at 62 LRRM 2007 and 53 CCH LC ¶ 11,169. It is set forth in full at Appendix A, 1a to 9a. The opinion of the United States District Court for the Eastern District of New York, dated July 9, 1965, is reported at 243 F. Supp. 246 and also at 59 LRRM 2745

and 52 CCH LC ¶16,567. It is set forth in full at pages 64-76 of the Record in the Court of Appeals and at Appendix B, 10a to 17a.

Jurisdiction

The judgment sought to be reviewed herein was dated and entered in the United States Court of Appeals for the Second Circuit on March 31, 1966 upon the appeal of Old Dutch Farms, Inc. from the order of the United States District Court for the Eastern District of New York dated and entered on July 9, 1965. The judgment of the Court of Appeals is set forth at Appendix C, 18a to 19a. The jurisdiction of this Court to review that judgment by writ of certiorari is invoked under 28 U. S. C. § 1254(1).

Question Presented

Where an employer and a union have entered into a collective bargaining agreement which prohibits direct strikes as well as "sympathetic strikes" and requires arbitration, *inter alia*, of "all disputes and controversies arising under or in connection with" the provisions of the agreement "or in respect to anything not herein expressly provided but germane to the subject matter of this agreement," is an action by the employer for damages under Section 303 of the Labor-Management Relations Act of 1947 arising from a strike called to protest the employer's violation of a specific provision of the agreement an arbitrable dispute?

Statutes Involved

The statutes involved are the National Labor Relations Act, as amended, 61 Stat. 136 (1947), Section 8(b)(4), 29 U. S. C. § 158(b)(4), and the Labor-Management Relations Act of 1947, 61 Stat. 136 (1947), as amended, Sections

203(d), 301(a) and 303, 29 U. S. C. §§ 173(d), 185(a) and 187.

Section 8(b)(4), in pertinent part, provides:

> "It shall be an unfair labor practice for a labor organization or its agents—
>
> * * *
>
> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9: . . ."

Section 203(d), in pertinent part, provides:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

Section 301(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined

in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 303 provides:

"(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Statement of the Case *

The petitioner Union is collective bargaining representative for employees working in the New York metropolitan area milk industry (1a).** At the time of the instant dispute, the Union and respondent Old Dutch Farms, Inc. were parties to an industry-wide collective bargaining agreement (*ibid.*). Section 16(a) of said agreement, the arbitration clause, provided in relevant part:

"16.(a) Any and all disputes and controversies arising under or in connection with the terms and

* The facts are set forth in the opinions of the Court of Appeals and the District Court which may be found at Appendices A and B respectively.

** Parenthetic references are to pages of the annexed Appendices.

provisions of this agreement, or in connection with or relating to the application or interpretation of any of the terms or provisions hereof, or in respect to anything not herein expressly provided but germane to the subject matter of this agreement, which representatives of the Union and the Employer have been unable to adjust, shall be submitted for arbitration . . ." (2a, 10a).*

* Section 17 of the agreement prohibited ". . . strikes, lockouts, walkouts, or slow-downs . . ." from being ". . . ordered, sanctioned, or enforced by either party hereto against the other . . ." and also forbade the Union to "call, sanction or enforce any sympathetic strike of its members." *

During 1962, Old Dutch opened a milk "depot" or "store" in Brooklyn for the retail sale of milk, milk products and other items (11a). This milk "depot" operated in defiance of Section 66A of the collective bargaining agreement, which expressly stated that it was a violation of the contract "for employers to establish, service, or deliver to 'depots for the purpose of distributing or selling milk'." (*ibid.*).

Section 66A was originally included in the agreement to protect milk industry job opportunities and employment standards threatened by increasing milk distribution through such "depots." (*ibid.*). The jobs threatened were those of the traditional "milkman," described in the collective bargaining agreement as a "routeman." Section 66A clearly forbids commercial milk depots or stores, such as the Old Dutch store, permitting only genuine charitable projects to use these otherwise prohibited means of distribution (*ibid.*).

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* Sections 16 and 17 are set forth on p. 4 of the agreement which was annexed to the moving affidavit of Bruce H. Simon in the District Court, pp. 13-58 of the Record in the Court of Appeals.

The Union initiated arbitration proceedings under Section 16(a) of the agreement against Old Dutch for violations of Section 66A (*ibid.*). While the arbitration hearings were still pending, other dairies opened similar stores (*ibid.*). The Union, acting to protect the interests of all the employees in the industry-wide bargaining unit, sought to close them. Old Dutch then filed unfair labor practice charges with the National Labor Relations Board, alleging that the Union had engaged in unlawful secondary activities by threatening a supplier of Old Dutch and inducing the supplier's employees to engage in work stoppages in an effort to cause it to cease doing business with Old Dutch (10a-11a). These unfair labor practice charges, after denial of a preliminary injunction by the District Court (48 CCH LC ¶18,458; 54 LRRM 2287), eventually resulted in a determination against the Union. 146 NLRB 509 (1964), enforced 341 F. 2d 29 (2nd Cir. 1965), *cert. den.* 382 U. S. 816 (1965).

In the meantime, an industry-wide arbitration concerning Section 66A had been initiated (11a). Instead of participating in the arbitration, Old Dutch sought an order requiring the original arbitration to be resumed to the exclusion of the industry-wide arbitration (*ibid.*). The District Court granted an order which required the Union to resume the original arbitration, and enjoined participation "in any other arbitration proceeding involving the same issues until the pending proceeding before Arbitrator Moskowitz is completed" *Old Dutch Farms, Inc.* v. *Milk Drivers Union Local 584*, 222 F. Supp. 125, 131 (E. D. N. Y. 1963). Upon the Union's stipulation that Old Dutch was not to be deemed a party to the industry-wide arbitration, the Court of Appeals stayed the District Court's order in so far as it enjoined that arbitration (11a).

The award in the industry-wide arbitration was issued on May 5, 1964. *In re Milk Industry and Milk Drivers Locals 584, 602 and 607, IBT*, 42 LA 893 (1964). The Union

thereafter withdrew its appeal from the order to resume the original arbitration (12a).

Old Dutch made no further effort to resume the original arbitration which the District Court ordered (*ibid.*). After ignoring for almost two years the procedure and remedy which it agreed to in Section 16(a) of the contract, Old Dutch commenced the instant action on or about March 10, 1965.

On July 9, 1965, the District Court granted the motion of the Union to stay all proceedings in this action pending arbitration of the claims presented by the complaint. In his opinion Judge Dooling found that the dispute presented by this action was "within the inclusive description of the arbitrable disputes" set forth in Section 16(a) of the agreement (10a). He concluded that there was no federal policy precluding the parties from having selected arbitration as the means of resolving the instant dispute, stating, in part, that "where, as here, * * * preemption is inoperative, there is no policy reason for boggling at arbitration, particularly since arbitration is itself a preferred mode of resolving labor disputes" (15a). The Court of Appeals reversed.

Reasons for Granting the Writ

The question presented by this case involves two important issues relating to arbitration of disputes between unions and employers. These are:

1. Whether claims based on alleged secondary strike activity are within the scope of an all-inclusive arbitration clause in a collective bargaining agreement; and

2. Whether claims which are within the scope of the arbitration clause and are also cognizable under Section

303 of the Labor-Management Relations Act of 1947 should be arbitrated.

The decision of the Court of Appeals with respect to the first of these issues is in conflict with applicable decisions of this Court. Although the District Court determined the second issue in the affirmative, the Court of Appeals did not expressly rule upon it, but merely held that the claim underlying the action was not arbitrable (9a). However, as is shown by the following discussion, the Court did reach the issue inasmuch as it considered the effect of the parties' failure to specifically include Section 303 actions in the arbitration clause (8a) and weighed the policies underlying submission of the claim to the courts rather than to an arbitrator (6a-9a). The resolution of this second issue involves important questions of federal law and national labor policy which have not been, but should be, decided by this Court.

The Court of Appeals' determination that the action does not involve an arbitrable claim is based on confusion between definition of arbitrable claims and definition of remedies with respect to claims. The Court's analysis was not made in terms of whether the Union's strike or Old Dutch's opening of a "depot" constituted conduct in violation of or relating to the agreement. It was made instead in terms of whether the parties specifically agreed when they entered their contract to substitute an arbitrator for a court in the event that a Section 303 case should be brought at some future time. Thus, the Court stated:

> "This leads to the conclusion that absent a clear, explicit statement in the collective bargaining contract directing an arbitrator to hear and determine the validity of tort damage claims by one party against another, it must be assumed that the employer did not intend to forego his rights under Section 303 and that the parties did not intend to

withdraw such disputes from judicial scrutiny" (8a).

The issue does not turn on Old Dutch's past failure to anticipate the present controversy over priority among tribunals. The issue is whether the parties agreed to submit to arbitration claims based on the type of conduct involved. Whether Old Dutch's judicial remedy is affected depends on the resolution of this issue and national labor policy relating to priority among courts and arbitrators in deciding disputes, not on Old Dutch's failure to expressly waive resort to the courts and not on Old Dutch's current preference of tribunal.

The appropriate division of issues is reflected in *Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers,* 370 U. S. 254 (1962), and *Atkinson* v. *Sinclair Refining Company,* 370 U. S. 238 (1962). Both of these cases involved motions for stays of Section 301 strike damage actions pending arbitration, and in each case the initial inquiry was whether the strike damage claim in and of itself appeared on its face to constitute an arbitrable issue under the relevant agreement. Arbitrability did not turn, in either case, on whether the parties expressly stipulated that claims cognizable under Section 301 were to be referred to an arbitrator rather than to the courts.

This Court stated in *Drake Bakeries* that:

> "The company asserts that there was a strike by the union in violation of the no-strike clause. It therefore has a 'complaint' against the union concerning the 'acts' or 'conduct' of the union. * * * Article V [the grievance and arbitration provision of the relevant agreement] on its face easily reaches the employer's claim against the union for damages caused by an alleged strike in violation of the contract." 370 U. S. 254, 258.

After the question of arbitrability was determined in *Drake Bakeries* the Court turned to the question of whether a stay was appropriate and based its determination on considerations of federal labor policy.

> "Under our federal labor policy, therefore, we have every reason to preserve the stabilizing influence of the collecitve bargaining agreement in a situation such as this. We could enforce only the no-strike clause by refusing a stay in the suit for damages in the District Court. We can enforce both the no-strike clause and the agreement to arbitrate by granting a stay until the claim for damages is arbitrated. This we prefer to do." 370 U. S. 254, 263-264.

Issue 1: Whether claims based on alleged secondary strike activity are within the scope of an all-inclusive arbitration clause in a collective bargaining agreement.

The claims involved in the action are arbitrable. In *United Steelworkers of America* v. *Warrior and Gulf Navigation Company,* 363 U. S. 574 (1960), this Court stated:

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement." 363 U. S. 574, 581.

If any doubts existed as to whether claims for strike damages were excepted from the above quotation, they were resolved in *Drake Bakeries.* In holding that an employer was obligated to arbitrate claims based on a strike which was allegedly violative of a no-strike clause, this Court said:

> ". . . as far as this record reveals, the contract continued in effect, as did the promises of the parties to arbitrate and the promise of the union not to strike. Moreover, in this case, under this contract,

> by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes." 370 U. S. 254, 261-262.

Drake Bakeries and *Warrior and Gulf* establish that "all of the questions on which the parties disagree," including claims based on strikes, are arbitrable unless specifically excluded from arbitration. The central question, therefore, is whether claims based on the strike alleged in this action have been so excluded. Analysis of the agreement in light of the decisions in *Drake Bakeries* and *Atkinson* v. *Sinclair Refining Company, supra,* shows that no such exclusion exists.

In *Atkinson* this Court found that the arbitration provision did not cover the employer's claim for strike damages because of an "express, flat limitation" which excepted all employer claims from arbitration.

> "Article XXVI then imposes the critical limitation. It is provided that local arbitration boards 'shall consider only individual or local employee or local committee grievances arising under the application of the currently existing agreement.' There is not a word in the grievance and arbitration article providing for the submission of grievances by the company. Instead, there is the express, flat limitation that arbitration boards should consider only employee grievances. Furthermore, the article expressly provides that arbitration may be invoked only at the option of the union." 370 U. S. 238, 243.

The agreement in *Atkinson* is in sharp contrast with the one between the Union and Old Dutch. "The arbitration clause is resolutely broad" (13a). Rather than containing express limitations, it extends to

> "Any and all disputes and controversies arising under or in connection with the terms and provisions

> of this agreement, or in connection with or relating to the application or interpretation of any of the terms or provisions hereof, or in respect to anything not herein expressly provided but germane to the subject matter of this agreement . . ." (10a).

In *Drake Bakeries* this Court noted that the arbitration article ". . . does not, as it did in *Atkinson,* exclude claims or complaints of the employer" (370 U. S. at 257) and considered, at 370 U. S. pp. 258-259, the employer's argument ". . . that only express inclusion . . ." of a strike damage claim in the agreement ". . . would suffice to require arbitration." The identical argument constituted the Court of Appeals' sole reason in the present case for finding that Old Dutch's claim was not arbitrable.

> "Since nothing in the record or collective bargaining agreement involved here provides a basis for finding that the employer and the union agreed to submit the employer's damage claim to an arbitrator, we reverse the decision of the district court." (9a).

This Court rejected the argument.

> "But it appears more reasonable to us to expect such a matter, if it is indeed so fundamental and so basic to the company under the contract, to have been excluded from the comprehensive language of Article V if the parties so intended." 370 U. S. 254, 259.

This is a restatement of the conclusion in *Warrior and Gulf, supra,* that all disputes between parties to a collective agreement are arbitrable unless specifically excluded from arbitration. 363 U. S. 574, 581. The record is devoid of any evidence indicating a specific exclusion for strike damage claims in general or for claims based on alleged strikes which are cognizable under Section 303. Accordingly, the claim herein is arbitrable.

In addition to applicability of these principles of *Warrior and Gulf* and *Drake Bakeries,* there are four considerations, founded in the agreement between the parties, which require holding Old Dutch's claim arbitrable.

1. The agreement's no-strike clause is directly related to the arbitration provision. It provides in pertinent part:*

> "(a) No strikes, lockouts, walkouts, or slowdowns shall be ordered, sanctioned, or enforced by either party hereto against the other during the life of this Agreement, except as against the party failing to comply with the decision and order of any arbitrator handing down a decision or making an award pursuant to Paragraph 16 hereof."

The conditioning of the promise not to strike upon compliance with the promise to arbitrate was also a feature of the agreement in *United Steelworkers of America* v. *American Manufacturing Co.,* 363 U. S. 564 (1960),** which provided that

> ". . . there would be no 'no strike,' unless the employer refused to abide by a decision of the arbitrator." 363 U. S. 564, 565.

The broad sweep of the no-strike clause in both agreements presumes an intention to give an equally broad interpretation to the related arbitration provisions. This presumption could have been expressly negatived.*** In

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* The clause is set forth on p. 4 of the agreement annexed to the moving affidavit of Bruce H. Simon.

** The arbitration clause in *American Manufacturing* was more limited than in the present case, extending only to

> "Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided. . . ." 363 U. S. 564, 565 n. 1.

*** Compare the no-strike clause in *Atkinson* v. *Sinclair Refining Company, supra,* which applied only to causes subject to the grievance procedure and to "'. . . any other cause, except upon written notice by Union to Employer * * *'" 370 U. S. 238, 241 n. 1.

the absence of limiting language, however, both provisions are to be given equally broad application.

> "There is no exception in the 'no-strike' clause and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other." *United Steelworkers of America* v. *American Manufacturing Co., supra,* at page 567.

2. This Court's conclusion in *Warrior and Gulf* that all disputes are arbitrable except those specifically excluded from arbitration establishes that the promise to arbitrate is in itself a separate contract whose limits are not circumscribed by the collective bargaining agreement's enumeration of regulated areas of conduct. Thus, Justice Brennan stated in his concurring opinion:

> "And I emphasize this, for the arbitration promise is itself a contract. The parties are free to make that promise as broad or as narrow as they wish, for there is no compulsion in law requiring them to include any such promises in their agreement." 363 U. S. at 570.

It will be shown in the following sub-point that Old Dutch's promise to arbitrate is directly referable to a specific provision of the agreement. Nevertheless, the separate promise to arbitrate extends to the present claim even if that promise is analyzed solely in the context of established policies governing arbitration.

The arbitration provision covers not only disputes relating to application or interpretation of terms of the collective agreement, but also to ". . . anything not herein expressly provided but germane to the subject matter of this agreement . . ." (10a). Any analysis along the lines suggested by Justice Brennan must conclude that the promise to arbitrate extends beyond disputes over matters expressly set forth in the collective agreement. Otherwise, the last quoted clause would be robbed of all

effect. Therefore, the promise's polar limitation, *i.e.*, arbitration of anything germane to the collective agreement's subject matter, must be read as prohibiting arbitration only of claims which do not bear on the relationship which the parties intended to establish by entering into their collective agreement. The nature of this relationship is alluded to in the agreement's preamble which provides:

> "WHEREAS, it is the desire of the parties to this agreement to establish, promote and foster a relationship that will be enduring and of mutual advantage to both the Union and the Employer,".*

This "desire" is common to all parties who enter into collective bargaining agreements. It has been described by this Court in the following terms.

> "A collective bargaining agreement is an effort to erect a system of industrial self-government. * * * Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators. * * * Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.
>
> * * *
>
> For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs." *United Steelworkers of America* v. *Warrior and Gulf Navigation Company, supra,* at pp. 580-582.

Old Dutch's claim is based on allegations of Union conduct which, if true, would undermine the very desires and objectives of the parties in entering into the collective agreement, as they are described in the agreement's preamble

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* See p. 1 of the agreement, annexed to the moving affidavit of Bruce H. Simon.

and the foregoing quotation. The nub of the complaint is Old Dutch's allegations that the Union called a strike of its supplier for the purpose of and with the result of making it impossible for Old Dutch "... to procure and obtain its daily and necessary supply of milk for use on its retail routes and for use in its store." * Such action would necessarily destroy the relationships sought to be established by the parties and frustrate the objective of "uninterrupted production under the agreement." Claims based on allegations of such action must, therefore, in the language of the promise to arbitrate, raise questions "... in respect to anything not herein expressly provided but germane to the subject matter of this agreement," even if it is assumed that they are not directly referable to a separate specific provision of the agreement.

3. The complaint alleges a violation of the no-strike clause and therefore states a claim based on alleged violation of specific terms of the agreement.

Paragraph (a) of the no-strike clause, which is quoted on p. 13, *supra,* prohibits strikes "... ordered, sanctioned, or enforced by either party hereto against the other ..." This is broad language. The prohibition is not limited to strikes of the employees of Old Dutch but extends to strikes enforced "against" Old Dutch. Paragraphs 6, 7, 8 and 9 of the complaint ** allege such a strike. Thus, it is alleged that the Union engaged in a strike among employees of Old Dutch's supplier, that there was no dispute between the

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* The complaint is set forth in pp. 1-8 of the Record in the Court of Appeals. The quotation is also found on p. 7a of Old Dutch's appendix in the Court of Appeals which accompanies this Petition.

** See pp. 2-3 of the Record in the Court of Appeals; p. 5a of Old Dutch's appendix in the Court of Appeals.

Union and the supplier, and that the strike was engaged in in furtherance of the Union's dispute with Old Dutch and for the purpose of causing the supplier's employees to refuse to perform services for Old Dutch. The allegations, therefore, are of a strike by the Union "against" Old Dutch.

The no-strike clause is even broader than the foregoing discussion indicates, and the allegations of the complaint are also referable to its second paragraph. That paragraph prohibits the Union from calling, sanctioning or enforcing " . . . any sympathetic strike of its members . . . " (13a). The complaint alleges a sympathetic strike insofar as it alleges that the strike of the supplier was in furtherance only of the dispute with Old Dutch and was intended to deprive Old Dutch of its source of milk.

4. There is no doubt that the strike complained of was a direct result of and was called to protest Old Dutch's violation of Section 66A.* Neither is there any doubt that the claimed violation of Section 66A was arbitrable and that arbitration thereof had been initiated prior to commencement of the strike and of this action. Facts with reference to this arbitration have been set forth earlier. It is clear that if the Union had called a strike of Old Dutch's employees, the matter would have been arbitrable not because the strike was primary, but because it arose out of a claimed

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* The allegations to this effect in the moving papers were not denied in Old Dutch's answering affidavit. See paragraph 4 of the affidavit of Herbert L. Maltinsky (pp. 60-61 of the Record in the Court of Appeals; p. 25a of Old Dutch's appendix in the Court of Appeals).

contract violation by the employer.* Such was this Court's alternate holding in *Drake Bakeries, supra,* in which the employer's claim was based on a January 2 strike called to protest the employer's Christmas and New Year's work schedules. Thus, this Court stated:

> "There is also involved a 'dispute' between the union and the company, for the union denies that there was a strike at all, denies that it precipitated any strike, denies that the employees were obligated under the contract to work on that January 2, and itself claims that the employer breached the contract in scheduling work for the holidays." 370 U. S. 254, 258.

The causal relation between the alleged action of Drake Bakeries in scheduling holiday work and the strike in that case is no stronger than the connection between Old Dutch's opening of a store and the Union's alleged secondary activity in this case.

The fact that the Union protested by alleged secondary rather than primary activity neither renders Old Dutch's violation of Section 66A less arbitrable, severs the connection between the initial violation and the protest, nor renders Old Dutch's damage claim less arbitrable. The matter would be non-arbitrable only if the agreement expressly excluded from arbitration claims based on secondary activity. The agreement does not do this.

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* The situation would be distinguishable from *Atkinson* v. *Sinclair Refining Company, supra,* which held that the incomplete record in that case was insufficient to establish that arbitrability of claims of 14 non-strikers for wages allegedly withheld because of the strike in and of itself rendered the employer's strike damage claim arbitrable. Not only were the claims separate from those which precipitated the strike, but the Court pointed out that the arbitrator could render an award in favor of the claimants by finding that they had not engaged in the strike, without reaching the question of responsibility for the strike. 370 U. S. 238, 244-245.

Issue 2: Whether claims which are within the scope of the arbitration clause and are also cognizable under Section 303 of the Labor-Management Relations Act of 1947 should be arbitrated.

In *Drake Bakeries, supra,* this Court held that a suit by an employer for damages allegedly resulting from the union's breach of a no-strike clause would be stayed pending arbitration of this very claim, even though Section 301 had originally been created to provide for such damage suits under federal substantive law. This holding is consistent with the statement of federal labor policy set forth in Section 203(d) of the Labor-Management Relations Act of 1947, which provides in part:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

This Court referred to Section 203(d) in *Drake Bakeries* and stated that federal labor policy seeks to preserve the "stabilizing influence of the collective bargaining contract" in strike damages disputes by giving "full play" to "the means chosen by the parties for settlement of their differences."

> "In passing § 301, Congress was interested in the enforcement of collective bargaining contracts since it would 'promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace' (S. Rep. No. 105, 80th Cong., 1st Sess. 17). It was particularly interested in placing 'sanctions behind agreements to arbitrate grievance disputes' (Textile Workers Union v. Lincoln Mills, 353 U. S. 448, 456, 77 S. Ct. 912, 917, 1 L. Ed. 2d 972). The preferred method for settling disputes was declared by Congress to be '[f]inal adjustment by a method agreed upon by the parties' (§ 203(d) of the Act, 29 U. S. C. § 173(d),

> 29 U. S. C. A. § 173(d)). 'That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play' (United Steelworkers v. American Mfg. Co., 363 U. S. 564, 566, 80 S. Ct. 1343, 1345, 4 L. Ed. 2d 1403). Under our federal labor policy, therefore, we have every reason to preserve the stabilizing influence of the collective bargaining contract in a situation such as this." 370 U. S. 254, 263-264.

The present issue is whether the federal labor policy underlying Section 303 is so different from the policy underlying Section 301 that the instant action should not be stayed pending arbitration, even though the issues are within the scope of the arbitration agreement.

Congress enacted Section 301 to provide a federal forum for the enforcement of collective bargaining agreements under federal substantive law, with the intention that this would promote industrial peace and stability. As stated by this Court in *Textile Workers Union* v. *Lincoln Mills of Alabama,* 353 U. S. 448, 454 (1957):

> "To repeat, the Senate Report, supra, p. 17, summed up the philosophy of § 301 as follows: 'Statutory recognition of the collective agreement as a valid, binding and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements and will thereby promote industrial peace.'"

With respect to the issue of whether Section 301 merely gave the federal courts jurisdiction to hear suits involving labor organizations or was to be regarded as a source of federal substantive law, this Court held that Section 301 created new substantive federal rights, stating:

> "We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." 353 U. S. at 456.

It is not contested that Congress passed Section 303 to give injured persons a right to sue for damages in the federal courts, for this is clear from its legislative history. Thus, Senator Taft, a leading proponent of Section 303, stated:

> "* * * * I think the threat of a suit for damages is a tremendous deterrent to the institution of secondary boycotts and jurisdictional strikes. * * * I see no reason why suits of this sort should not be permitted to be filed. After all, it is only to restore to people, who lose something, because of boycotts and jurisdictional strikes, the money which they have lost." 93 Cong. Rec. 5060 (May 9, 1947), 2 *Legislative History of the Labor Management Relations Act, 1947* (*Leg. Hist.*) 1371.

Senator Taft also acknowledged as "correct" a statement that "all the amendment [Section 303] would do, if adopted, would be to create a cause of action for damages which could be heard before a jury in a Federal court." 93 Cong. Rec. 5061 (May 9, 1947), 2 *Leg. Hist.* 1372. He described "the right to sue for damages" as "a very vital thing to retain" (93 Cong. Rec. 5046 (May 9, 1947), 2 *Leg. Hist.* 1365) and, at another point, said of his amendment that: "It retains simply the right of suit for damages * * *." 93 Cong. Rec. 5060 (May 9, 1947), 2 *Leg. Hist.* 1371. In each case, he was obviously referring merely to avoidance of preemption by the National Labor Relations Board.

That Congress enacted Section 303 to give injured persons a right to sue for damages in the federal courts under federal substantive law is not sufficient reason to conclude that Congress also intended that such an issue should not be arbitrated where it is within the scope of an arbitration agreement. The legislative history of Section 301 and court decisions construing Section 301 clearly indicate that Congress also enacted Section 301 to give injured persons the right to sue for damages in the federal courts under federal substantive law.

The fact that Section 303 created a federal cause of action as a "deterrent" to secondary activity must also be considered in the context of recent decisions enunciating the federal labor policy that arbitrable disputes should be settled by arbitration. In *Drake Bakeries, supra,* the Court specifically held that the concept of an " 'effective' deterrent * * * is not a question to be answered in abstract or general terms," but must be answered by determining "what result will best impose industrial peace" in the particular case. 370 U. S. at 266. The majority rejected the view of Mr. Justice Harlan, dissenting, 370 U. S. at 267, that a suit for damages in the federal courts under federal law was a matter "with respect to which a court of law can hardly be deemed less competent, as an adjudicator, than an arbitrator."* Thus, the arbitrator's jurisdiction has been extended to a federal action for damages, and the fact that Section 303 created a federal forum or was intended to deter injurious activity neither prevents such cases from being arbitrable nor precludes a stay pending arbitration.

The Court of Appeals favored submission of Old Dutch's claim to the courts because it required resolution of two issues with respect to which courts ". . . hardly can be considered less competent than a labor arbitrator. . . ." (8a) These issues were (1) determination of whether the Union had violated Section 8(b)(4) and (2) assessment of Old Dutch's injuries (7a-8a). The assumption regarding relative competence depends, of course, upon the talents of the judges and arbitrators who might hear a specific dispute. But in any event the conclusion drawn is not valid because it is also based on an additional unexpressed assumption which is erroneous in the context of this action.

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* The Court of Appeals cited this portion of Justice Harlan's dissent to support its conclusion that it must be assumed the parties did not intend to withdraw Section 303 actions from the courts (8a).

The additional assumption is that Old Dutch's only remedy for damages caused by secondary activity which falls within the scope of Section 8(b)(4) is a Section 303 action, and that an arbitrator would necessarily have to apply Section 8(b)(4) without regard to other relevant factors. The existence of an additional Section 303 cause of action does not however eliminate the possible existence of a contract violation. The arbitrator would properly consider the entire contract relationship.

There is no legislative record to the effect that Congress in enacting Section 303 intended to preempt arbitration proceedings. Thus, as the District Court stated,

> "In this field of law, the policy impregnated preemption is preemption of judicial proceedings by NLRB proceedings (*San Diego Bldg. Trades Council* v. *Garmon,* 1959, 359 U. S. 236), and where, as here, that preemption is inoperative, there is no policy reason for boggling at arbitration . . . " (15a)

Rather than being bound by identical procedures and substantive rules, arbitrators and courts may very well proceed in different fashions in determining damages claims which are cognizable under contracts as well as statutes. But this is a consequence of the nature and jurisdictional limits of the forum. It does not justify foreclosure of recourse to the forum selected by the parties in favor of a forum created by Congress to entertain identical claims.

> "If the union did strike in violation of the contract, the company is entitled to its damages; by staying this action, pending arbitration, we have no intention of depriving it of those damages. We simply remit the company to the forum it agreed to use for processing its strike damage claims. That forum, it is true, may be very different from a courtroom, but we are not persuaded that the remedy there will be inadequate." *Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers, supra,* at p. 266.

> "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts." *United Steelworkers of America* v. *Warrior and Gulf Navigation Company, supra* at p. 581.

The present case is an excellent example of situations in which courts and arbitrators may diverge in their handling of claims based on secondary activity. Although a court's inquiry would be limited to the issues of a technical violation of Section 8(b)(4) and the amount of damages sustained thereby, the arbitrator's inquiry could extend to all relevant issues which are germane to the subject matter of the agreement. Thus, Old Dutch's violation of Section 66A and its bearing upon the strike damages claim could be considered along with other developments which might have arisen since the opening of the original Brooklyn store. The Court of Appeals' assumption that courts are as competent as arbitrators to determine the issues raised by Old Dutch's claim is untenable when the full scope of the arbitrator's jurisdiction with respect to the claim is realized.

CONCLUSION

For the foregoing reasons, it is respectfully requested that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Appendix A

(Opinion of the United States Court of Appeals for the Second Circuit—March 31, 1966)

Before:

WATERMAN, MOORE and FRIENDLY,

Circuit Judges.

MOORE, *Circuit Judge*:

The appellee, Milk Drivers and Dairy Employees Local Union No. 584 (the union), is the collective bargaining representative for employees working in the New York metropolitan area milk industry. The union and the appellant, Old Dutch Farms, Inc. (the employer), were parties to an industry-wide collective bargaining agreement. In December 1962, a dispute arose between the employer and the union concerning whether the employer, by opening a milk "depot" in Brooklyn for the retail sale of milk and milk products, had violated Section 66A of the collective bargaining agreement.[1] This dispute was submitted to arbitration in the spring of 1963 pursuant to arbitration procedures provided for in the collective agreement. Subsequently, in May 1963, the union proceeded to induce employees of a neutral employer (a supplier of Old Dutch Farms, Inc.) to engage in work stoppages, and to threaten such employer, in an effort to cause such employer to cease doing business with Old Dutch Farms, Inc. Thereafter, Old Dutch Farms, Inc. filed a petition with the National Labor Relations Board (the NLRB) alleging that the union was engaged in unlawful secondary activity. On October 9, 1963, the NLRB held that the union had violated Section 8(b)(4)(i) & (ii)(B) of the Labor Management Relations Act (the LMRA), 29 U. S. C. A. § 158(b)(4)(i) & (ii)(B), 146 NLRB 509 (1964),

[1] § 66A of the collective agreement provides in relevant part that "it shall be a violation of this agreement for any party . . . to sell or distribute milk retail from wholesale trucks, or for employers to establish, service, or deliver to depots for the purpose of distributing or selling milk."

and its decision was enforced by this court in January 1965. *NLRB* v. *Milk Drivers & Dairy Employees Local No. 584*, 341 F. 2d 29 (2d Cir. 1965).

In March 1965 the employer commenced the present action in the United States District Court for the Eastern District of New York, pursuant to Section 303[2] to collect damages for business injuries sustained as a result of the union's allegedly unlawful activity. The union made a motion to stay all proceedings in the action pending arbitration of the damage claim on the ground that the disputes came within the purview of the general arbitration clause contained in the collective agreement. The arbitration clause provided that "any and all disputes and controversies arising under or in connection with the terms and provisions of this agreement, or in connection with or relating to the application or interpretation of any of the terms or provisions hereof, or in respect to anything not herein expressly provided but germane to the subject matter of this agreement . . . shall be submitted for arbitration to an arbitrator . . ." The trial court granted the motion finding that the employer's statutory action presented a controversy which was "within the inclusive description of the arbitrable disputes," 243 F. Supp. 246,

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[2] § 303 of the LMRA, 29 U. S. C. § 187 provides:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commence, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of Section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

247, set forth in the arbitration clause and concluded that "the dispute . . . arises out of the contract relation not only because it centered on the 'depot' clause in the contract, but also because Section 17 contained a no-strike clause which forbade the Union to 'call . . . any sympathetic strike of its members . . .'" 243 F. Supp. 246, 248. We reverse on the ground that the employer is not precluded by the arbitration clause in the parties' collective agreement from asserting in the district court a claim for tort damages based on the alleged unlawful secondary activity of the union and forced to rely upon arbitration for relief.

It is well established that whether an employer is required to arbitrate, as well as what issues he must arbitrate, "is a matter to be determined by the Court on the basis of the contract entered into by the parties." *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962). Moreover, an employer "cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582 (1960); see *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, 547 (1964). Thus, the principal issue raised by this appeal is whether the employer's tort damage claim constitutes an arbitrable issue within the meaning of the broad arbitration clause contained in the parties' collective bargaining agreement.[3]

This action arises under Section 303(a) and (b). It is in no way based on an alleged breach of contract and neither invokes nor needs to invoke the contract. The employer asserts that it "was injured in its business and property" and seeks damages solely for the injuries caused

[3] It should be noted that the present suit constitutes a special case under § 303 in that there is a contractual relationship between the parties to the suit. § 303 provides an employer with a federal right to sue any union that damages him by engaging in activity proscribed by § 8(b)(4) irrespective of whether a contractual relationship exists between them.

by the union's allegedly unlawful activity. Both the union and the district court maintain, however, that the employer's tort damage claim is an arbitrable dispute on the ground that it is connected with and "germane to the subject matter of" the collective agreement. Their theory is that the dispute is intimately related to Section 66A of the collective agreement since the business injury which forms the basis for the employer's Section 303 damage claim was caused by union activity which was originally provoked by an alleged breach of that section. They argue that since the union's secondary activity constituted a response to an alleged breach of contract by the employer, the damage claim is inextricably connected with the interpretation of the contract provision which it allegedly violated. But, this action bears no meaningful connection with the terms, conditions or subject matter of the parties' collective bargaining agreement. The fact that the union activity which forms the basis for this Section 303 damage suit was provoked by an alleged breach of contract by the employer is no reason to conclude that this suit arises under or is connected with the interpretation of the collective agreement within the meaning of the arbitration clause. This is so, not only because this suit rests solely on Section 303 and cannot be considered as a contract claim [4] but, more significantly, because whether or not the employer violated Section 66A of the collective agreement has no bearing on the validity of the Section 303 suit and the determination of the issues it presents, *viz.*, whether the union violated Section 8(b)(4) of the NLRA and whether and to what extent the employer sustained actual damages as a result of the union

[4] Judge Dooling's partial reliance on the no-strike clause in the parties' collective agreement to support his conclusion that the present action arose under the contract is erroneous. 243 F. Supp. 246, 248 (E. D. N. Y. 1965). This action is not based in any way on an alleged violation of that clause by the union or, for that matter, on any violation of the contract by the union.

activity. Quite apart from the agreement and its arbitration clause, the present action arises under the terms and conditions of specific federal labor statutes, *i.e.*, Section 303 of the LMRA and Section 8(b)(4) of the NLRA and is concerned only with their interpretation and application. Moreover, nothing in the broad arbitration clause involved here commits to arbitration disputes which are unrelated to the interpretation of particular provisions of the collective agreement or to the subject matter of the agreement. It cannot be said that the present dispute is germane, *i.e.*, relevant, see *Webster's New International Dictionary* (2d ed. 1961), to the subject matter of the collective agreement for there is no indication either in the record or in the contract itself that the subject of tort damages suffered by either party to the contract ever was discussed or referred to by the parties when they negotiated their industrial code. Reason dictates that for a dispute to be characterized as germane to the subject matter of the contract it must at the very least raise some issue, the resolution of which requires a reference to, or construction of, some portion of the contract involved. Thus, "whatever other effect the agreement to arbitrate may have had, the agreement did not even suggest that the question of violation (or not) of § 303 was arbitrable." *United States Steel Corp.* v. *Seafarer's International Union*, 237 F. Supp. 529, 532 (E. D. Pa. 1965). In *Seafarer's International Union, supra*, the court in like manner dismissed a motion to stay a Section 303 damage claim pending arbitration, although it was admittedly confronted with a narrower arbitration clause than the one involved here. There the union argued that the employer's Section 303 damage claim should be submitted to arbitration on the basis of an arbitration clause which provided that "any alleged violations or disputes arising under this Agreement" shall be submitted to an arbitrator. The court concluded that the Section 303 action was not embraced in the arbitration agreement and, thus, refused to order arbi-

tration pointing out that "parties cannot be compelled to go to arbitration on issues which they have not agreed to submit to arbitration." *Id.* at 532. See *Twin Excavating Co.* v. *Local Union No. 731*, 337 F. 2d 437 (7th Cir. 1964).[5]

There is a strong national labor policy favoring arbitration as a means of resolving disputes between parties to collective bargaining agreements concerning the interpretation or application of those agreements and, as a result, arbitration clauses that relate to such disputes should be liberally construed. E.g., *United Steelworkers* v. *Warrior & Gulf Nav. Co., supra*; see Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 Mich. L. Rev. 751, 752-68 (1965); *cf.* Section 203(d) of the LMRA, 29 U. S. C. § 173(d).[6] Contrary to the union's position, however, such principles do not have any direct bearing on the issue presented here since they were formulated in the context of actions arising under Section

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[5] In *Twin Excavating Co.*, the Seventh Circuit affirmed the denial of a motion to stay a § 303 suit pending arbitration. The rationale of the court, however, does not clearly emerge from its two-page opinion. On one hand, the court raised serious questions about the validity of the arbitration clause in the collective agreement invoked by the union and, thus, its comments with respect to the arbitrability of § 303 claims can justifiably be treated as dictum. On the other hand, the decision can be construed as saying that the usual arbitration clause contained in collective agreements is not broad enough to encompass an action under § 303, for the court stated the issue before it as whether the LMRA "contemplated an arbitration proceeding as a substitute for a court hearing in a suit for damages under § 303," *id.* at 438, and the arbitration clause before the court provided only that all the conditions and articles of the collective agreement were to be enforced by a committee selected by the parties to the contract.

[6] § 203(d) of the LMRA, 29 U. S. C. § 173(d), provides in relevant part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of *grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.* (Emphasis added.)

301, which authorizes suits for the violation of collective bargaining contracts, 29 U. S. C. § 185(a), and pertain to the desirability of *contract* arbitration as a means for insuring industrial peace. The interpretation and application of the terms of a collective bargaining agreement is a function that traditionally has been considered to be within the peculiar province of labor arbitrators and, therefore, it is reasonable to presume that when parties to a collective agreement insert a broad arbitration clause in it, they intend all disputes which require performance of that function to be determined by an arbitrator, unless they specifically exclude them from arbitration. Such reasoning, however, does not apply with equal force to suits, like the present one, which arise under Section 303 since the issues raised in such a proceeding are the kind which have traditionally been determined by courts and concern matters to which the expertise of labor arbitrators does not necessarily extend.

The resolution of the present controversy requires (1) a determination of whether the union violated Section 8(b)(4) of the NLRA,[7] and (2) an assessment of the actual business

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[7] Prior to the commencement of this action, the NLRB determined that the union had violated § 8(b)(4) of the NLRA. It should be noted, however, that a prior determination by the Board is not a prerequisite to an action by an employer under § 303. The administrative and judicial actions and remedies are viewed as entirely independent, *i.e.*, § 303 suits constitute a clear exception to the exclusive jurisdiction of the NLRB over alleged unfair labor practices. E.g., *International Longshoreman's & Warehouseman's Union* v. *Juneau Spruce Corp.*, 342 U. S. 237 (1952); *Note*, 40 *Ind. L. Rev.* 55 (1964); see *Local 20, Teamsters* v. *Morton*, 377 U. S. 252, 258-59 n. 13 (1964); Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 Harv. L. Rev. 529, 549-50 (1963). Moreover, an administrative determination, such as the one involved here, does not bind a court confronted with the question of whether particular union activity violated § 8(b)(4) in a § 303 suit. Compare *NLRB* v. *Deena Artware, Inc.*, 198 F. 2d 645 (6th Cir. 1952), *cert. denied*, 345 U. S. 906 (1953), with *United Brick & Clay Workers* v. *Deena Artware, Inc.*, 198 F. 2d 637 (6th Cir.), *cert. denied*, 344 U. S. 897 (1952).

injuries sustained by the employer. Courts hardly can be considered less competent than a labor arbitrator, whose forte is more likely to be in the area of contract disputes and "employee's grievance claims . . . ," *Drake Bakeries* v. *Local 50*, 370 U. S. 254, 267 (1962) (Harlan, *J.*, dissenting), to determine whether particular union activities violate a federal labor statute or to assess the extent of an employer's business injuries. See Fleming, *Arbitrators and the Remedy Power*, 48 Va. L. Rev. 1199, 1220 (1962). Thus, there is no special reason to presume that the parties to a collective bargaining contract desire to submit to an arbitrator disputes concerned with an employer's statutory right to recover damages caused by specific union unfair labor practices which is entirely separate from any right conferred on him by Section 301, see *United States* v. *Laburnum*, 347 U. S. 656, 665-67 (1954); 2 *Legis History of the Labor Management Relations Act of 1947* 1371-72 (1948). "The less so, from the standpoint of the employer, when it is recognized that any damages awarded by an arbitrator would not be self-enforcing." *Drake Bakeries* v. *Local 50, supra*, at 268 (Harlan, J., dissenting). This leads to the conclusion that absent a clear, explicit statement in the collective bargaining contract directing an arbitrator to hear and determine the validity of tort damage claims by one party against another, it must be assumed that the employer did not intend to forego his rights under Section 303 and that the parties did not intended to withdraw such disputes from judicial scrutiny.

The Supreme Court's decision in *Drake Bakeries* v. *Local 50*, 370 U. S. 254 (1962), holding that a claim for damages based on a breach of a no-strike provision in a collective bargaining agreement under Section 301 should be submitted to arbitration does not suggest a contrary result. Although as a result of that decision the arbitrator may be called on to assess contract damages (assuming he finds

that the parties intended to delegate that function to him), the primary question submitted to the arbitrator in *Drake Bakeries* was whether the strike activity on the part of the union violated a no-strike provision in the collective bargaining contract—a question which the Court stated "appears to us to be one particularly suited for arbitration." *Id.* at 266. In other words, whether the employer was entitled to contract damages turned on a question of contract interpretation which "was peculiarly within the expertise of an arbitrator." Smith & Jones, *supra,* at 767.[8] By direct contrast, the present suit under Section 303 does not raise any question of contract interpretation which can be characterized as particularly suited for arbitration. Rather, the validity of the employer's claim for tort damages turns solely on issues which are particularly suited for judicial adjudication.

Since nothing in the record or collective agreement involved here provides a basis for finding that the employer and the union agreed to submit the employer's damage claim to an arbitrator, we reverse the decision of the district court.

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[8] Moreover, it has been pointed out that *Drake Bakeries* does not indicate how the Court would react to the questions "of arbitrability and arbitral authority under a bilateral arbitration provision where there is clearly a breach of the no-strike clause and the only issue concerns the nature of the remedy." Smith & Jones, *supra,* at 768.

Appendix B

(Opinion of the United District Court for the Eastern District of New York—July 9, 1965)

DOOLING, *D. J.*

Plaintiff has sued defendant in two counts, under Section 303 of the Labor Management Relations Act (29 U. S. C. A. § 187), for damages caused by defendant's conduct, which has been held by the National Labor Relations Board (146 NLRB No. 62, 1964) and the Court of Appeals (1965, 341 F. 2d 29) to have been a secondary boycott violative of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (29 U. S. C. A. § 158(b)(4)(i) and (ii)(B)); the first count alleges the 1963 strike and picketing by which defendant sought to prevent Balsam Farm, Inc. from continuing to process milk for plaintiff so long as plaintiff continued to sell the milk at its low-cost "depot" store; the second count realleges the facts and alleges that the National Labor Relations Board determined that the strike and picketing were an unfair labor practice and that the Court of Appeals has granted enforcement of the NLRB order.

Defendant moves to stay the action pending arbitration; it relies on a clause in the contract between the parties which provides [Sec. 16(a)] for the arbitration of

> "Any and all disputes and controversies arising under or in connection with the terms and provisions of this agreement, or in connection with or relating to the application or interpretation of any of the terms or provisions hereof, or in respect to anything not herein expressly provided but germane to the subject matter of this agreement. . . ."

As the dispute that is the gist of the action is within the inclusive description of the arbitrable disputes, the action must be stayed pending arbitration; that the action rests

on the statute and its violation, is squarely placed on LMRA § 303, and neither invokes nor needs to invoke the contract does not preclude arbitration.

The dispute started with the Union's claim in 1962 that plaintiff, in opening a special low-cost milk and sundries store, violated the labor contract, Schedule B, Section 66A which, in the interest of preserving the traditional retail route deliveries—and retail routemen's jobs—provided that employers would not establish, service or deliver to "depots for the purpose of distributing or selling milk," with the exception of certain listed preexisting "milk stations," and of milk stations at nurseries, or other charitable institutions, at which the nursery or charity gave the milk away. The Union put that claim into arbitration with plaintiff but while the arbitration hearings were still going on, the Union, perhaps upset by the opening by other dairies of similar stores, took the strike and picketing action that led to plaintiff's successful appeal to the NLRB's unfair labor practice and enforcement proceedings.

Plaintiff also sought to compel the Union to resume the arbitration, to the exclusion of an industry-wide arbitration that had, meanwhile, been initiated. Chief Judge Zavatt in substance gave that relief (222 F. Supp. 125), but his order was stayed pending appeal upon a stipulation that plaintiff's interests would be unaffected by the industry-wide arbitration.

The industry-wide arbitration ended in May 1964 with the award of a contract term under which "depot" type stores were not forbidden, but under which the Union could obtain redress against employer distribution of milk or milk products in an unreasonable manner or at "unreasonably low prices" (15 U. S. C. A. § 13a), "unreasonableness" to be assayed by standards that included protection of the rival interests (1) of the workers in job security and wages, hours and working conditions and (2)

of the public in the continuing availability of various services to it afforded by a variety of methods of milk distribution. After the award, the Union withdrew its appeal from Chief Judge Zavatt's order and the parties discontinued the proceeding to compel resumption of the arbitration, agreeing that plaintiff was not bound by the industry-wide award.

No further effort was made to complete the separate arbitration between the parties. The present action under LMRA § 303 was commenced shortly after the Court of Appeals affirmed and granted enforcement of the NLRB's determination of the unfair labor practice proceeding adversely to the Union.

Plaintiff insists that its suit is based solely on the statutory wrong, that only a judicial, as distinguished from an arbitral, jurisdiction is established by LMRA § 303, that the arbitration clause is not in fact broad enough to reach the statutory wrong here involved, and that, in any event, a contract arbitration clause is not competent to require arbitration of the purely statutory and non-contractual wrongs defined by NLRA § 8(b)(4)(i) and (ii)(B), which are judicially implemented by LMRA § 303, and are set in sharp statutory contrast to the purely contractual and hence arbitrable subject matter of LMRA § 301. *Twin Excavating Co.* v. *Local Union No. 731,* 7th Cir. 1964, 337 F. 2d 437; *United States Steel Corporation* v. *Seafarers' International Union,* E. D. Pa. 1965, 237 F. Supp. 529.

The Union argues that the arbitration clause does in fact embrace and is legally competent to embrace the unfair labor practice here involved and that compulsory arbitration even of an LMRA § 303 claim is within the policy expressed by *Drake Bakeries, Inc.* v. *Local 50,* 1962, 370 U. S. 254, 263-266 and by LMRA § 203(d) ["adjustment by a method agreed upon by the parties is . . . declared . . . the desirable method for settlement of *grievance disputes*

arising over the application or interpretation of an existing collective-bargaining agreement'' (emphasis added)].

The arbitration clause is resolutely broad. The dispute, although the business injury it caused is remediable purely as a statutory tort, arises out of the contract relation not only because it centered on the ''depot'' clause in the contract, but also because Section 17 contained a no-strike clause and forbade the Union to ''call, sanction or enforce any sympathetic strike of its members''; Section 17 also required the employer not to ''aid other companies in any fight that may be waged against the Union.'' Whether or not plaintiff could at its election have sued on the contract as for a breach of it under LMRA § 301, plaintiff's present statutory action, viewed as such and not as ''arguably'' a contract claim as well, presents a dispute or controversy that is connected with the contract, its interpretation and application and is germane to the subject matter of the contract. *Cf. Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 2d Cir. 1959, 271 F. 2d 402, 410-412; *Almacenes Fernandez S.A.* v. *Golodetz*, 2d Cir. 1945, 148 F. 2d 625, 628-629; *Robinson* v. *Bache & Co.*, S. D. N. Y. 1964, 227 F. Supp. 456, 458; *Saucy Susan Products, Inc.* v. *Allied Oil English, Inc.*, S. D. N. Y. 1961, 200 F. Supp. 724, 727-728; *Chiron* v. *Mayr*, 1st Dept. 1963, 19 A. D. 2d 54, 241 N. Y. S. 2d 144; *Siegel* v. *Ribak*, Kings Co. 1964, 43 Misc. 2d 7, 249 N. Y. S. 2d 903. *Cf. Jackson* v. *Atlantic City Electric Co.*, D. N. J. 1956, 144 F. Supp. 551; *Metal Polishers* v. *Rubin*, E. D. Pa. 1949, 85 F. Supp. 363. The Arbitration Act does not require (9 U. S. C. A. § 2), nor does principle require, that an arbitration clause be confined to arbitration of breaches of the contract in which the agreement to arbitrate is contained; if there is a limitation on the scope of legally enforceable arbitration agreements, it operates in terms of specificity of subject matter [6A Corbin, Contracts (1962) 392, § 1433] and not in terms that result in confining arbitration to claims for breach

of contract. Here, the clause is broad but has specificity in its limitation to matters connected with the collective bargaining relation.

If the declared policy favoring arbitration of labor-management disputes (*Drake Bakeries, Inc.* v. *Local 50, supra; United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 1960, 363 U. S. 574, 577-578, 581-583) were limited to cases over the interpretation and application of collective bargaining agreements [*cf.* LMRA § 203(d)], it could not be said with certainty to reach the present case, nor could any arbitration of strike damages, conducted after the strike ended, be supposed to fulfill that part of the policy favoring labor arbitration that rests on a view of arbitration as furnishing a direct substitute for industrial strife (*United Steelworkers* v. *Warrior & Gulf Nav. Co., supra*, 363 U. S. at 578). But the policy is not framed that narrowly, and, even in the absence of an affirmative labor law policy favoring arbitration of the present sort of dispute, there would remain the homelier point that the agreement to arbitrate is valid and enforceable (although not additionally favored by a special subject matter policy) simply as an agreement to arbitrate matters that it is lawful to agree to arbitrate, notwithstanding the implicit "waiver" of a statutory remedial procedure. *Cf. Wilko* v. *Swan*, 1953, 346 U. S. 427; *Moseley* v. *Electronic & Missile Facilities, Inc.*, 374 U. S. 167, 171-173; *Leesona Corp.* v. *Cotwool Mfg. Corp.*, W.D.S.C. 1962, 204 F. Supp. 141, 143, apparently disapproved in affirming result, 4th Cir. 1963, 315 F. 2d 538, 542; *Matter of Gale*, N. Y. Co. 1941, 176 Misc. 277, 27 N.Y.S. 2d 18. Contrast *Reader* v. *Hirsch & Co.*, S.D.N.Y. 1961, 197 F. Supp. 111. In the present case arbitration works no waiver of policy protections. The procedures of the NLRB under Section 8(b)(4)(i) and (ii) are unimpaired, may be set in motion by plaintiff's complaint although plaintiff also presses its private demand in court (or in arbitration) under LMRA

§ 303, and the NLRB proceeding need not be affected in any way by what occurs in an arbitration of the same issue. *Cf. Internat'l Longshoremen's & Warehouseman's Union* v. *Juneau Spruce Corp.*, 1952, 342 U. S. 237, 243-244; *Carey* v. *Westinghouse Electric Corp.*, 1964, 275 U. S. 261, 270-272; *Ramsey* v. *N.L.R.B.*, 7th Cir. 1964, 327 F. 2d 784. If an unfair labor practice coincides with a contract breach, there appears to be no hesitation in permitting two proceedings to go forward, an unfair labor practice proceeding and an arbitration, as in the *Ramsey* case, and in *United States Steel Corp.* v. *Seafarers' International Union*, E. D. Pa. 1965, 237 F. Supp. 529, the Court ordered an arbitration that, it contemplated, might be a complete defense to an LMRA § 303 claim that counted on some of the same operative facts. If the labor legislation is hospitable to the concurrency of arbitral or of state judicial determinations with NLRB determinations in unfair labor practice proceedings on the same issues (*Carey* v. *Westinghouse Electric Corp., supra*, 375 U. S. at 272; *Smith* v. *Evening News Assn.*, 1962, 371 U. S. 195, 197-198; *N.L.R.B.* v. *Local 282*, 2d Cir. 1965, 344 F. 2d 649, 652), there is no ground for concluding that any labor law policy forbids arbitration of a strike damage claim brought under LMRA § 303, but countenances arbitration of it if it is framed also as a claim under LMRA § 301. *Cf. United States Steel Corp.* v. *Seafarers' International Union, supra.* In this field of law, the policy impregnated preemption is preemption of judicial proceedings by NLRB proceedings (*San Diego Bldg. Trades Council* v. *Garmon*, 1959, 359 U. S. 236), and where, as here, that preemption is inoperative, there is no policy reason for boggling at arbitration, particularly since arbitration is itself a preferred mode of resolving labor disputes. *Cf. Trailways of New England, Inc.* v. *Mitchell*, 1st Cir. 1965, 343 F. 2d 815, 818.

Appendix B

Twin Excavating Co. v. *Local Union No. 731*, 7th Cir. 1964, 337 F. 2d 437 appears in dictum to imply that a claim under LMRA § 303 is not arbitrable, but the point is not elaborated, if it is being made, and it appears to be related to an assumption that only contract violations are arbitrable. A similar assumption may seem to lurk, unarticulated, in *United States Steel Corporation* v. *Seafarers' International Union, supra,* but the Court ordered arbitration of a typical secondary boycott claim in so far as it was framed under LMRA § 301 and allowed the case to continue (for pre-trial proceeding purposes) insofar as it was framed under LMRA § 303, indicating, however, that the § 303 trial would be delayed until after the arbitration was over, so that the award could be considered in rendering judgment on the § 303 count (237 F. Supp. at 533); it appears plain that if the § 303 count embraced only the facts that underlay the § 301 count, the Court would not grant additional relief under § 303 (237 F. Supp. at 531 and fn. 3); the Court appears, thus, to have been saving out any purely statutory tort claim of § 303 to the extent that it did not duplicate the contract claim of § 301, and the Court was doing that because the arbitration clause was limited to contract claims; in express deference to the policy favoring arbitration, the Court refused to withhold enforcement of the arbitration clause, rejecting the argument that the particular breach was an unfair labor practice and, as such, not arbitrable. The Court's ultimate action seems to have turned on the fact that there was no agreement to arbitrate the § 303 claim so far as it was purely statutory and not contractual; its action did not depend on any conclusion that there could not be an agreement to arbitrate the statutory wrong as such; rather, the Court distinguished the *Twin Excavating* case in part on the ground that "the § 303 action upon which the *Twin Excavating* suit was predicated was not embraced in the arbitration agreement" (237 F. Supp. at 532).

Appendix B

The agreement to arbitrate is, therefore, enforceable even though it results in requiring plaintiff to arbitrate an unfair labor practice claim under LMRA § 303. Defendant has not lost the right to arbitrate by delay or waiver. It has moved to stay the present action in good season; the failure to pursue the earlier arbitration, if it could properly have extended to reach the present claim, is so obscured in the mists of the parties' 1963 and 1964 strategy that it can not be thought to bear on the arbitrability today of the claim presented by plaintiff's complaint.

Accordingly, on defendant's motion, it is

ORDERED that the action and all proceedings in it be and they hereby are stayed pending arbitration of the claims presented by the complaint pursuant to the provisions of Section 16 of the Milk Industry Collective Bargaining Agreement (October 24, 1961 to October 24, 1963).

Brooklyn, New York
July 9, 1965.

JOHN F. DOOLING, JR.
U.S.D.J.

Appendix C

(Judgment of the United States Court of Appeals for the Second Circuit—March 31, 1966)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of March one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
" LEONARD P. MOORE,
" HENRY J. FRIENDLY,
Circuit Judges.

OLD DUTCH FARMS, INC.,
Plaintiff-Appellant,

v.

MILK DRIVERS AND DAIRY EMPLOYEES, LOCAL UNION #584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

Appendix C

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to the appellant.

A. DANIEL FUSARO,
Clerk.